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No. 132

IN THE

Supreme Court of the United States

October Term, 1965

MARGARET L. HOLT and KATHLEEN L. MCMAHON, individually and on behalf of all other shareholders of Alleghany Corporation similarly situated,

Petitioners,

AGAINST

ALLAN P. KIRBY, CHARLES T. IRELAND, JR., FRED M. KIRBY and ALLEGHANY CORPORATION,

Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit—Granted June 1, 1965.

Motion for Leave to File *Amicus Curiae* Brief Solely on Jurisdictional Issue Because of Its Abandonment by Petitioners After Writ Was Granted

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SIMON V. HABERMAN,
No. 2112 Broadway,
New York, N. Y. 10023.

Attorney for Movant
Randolph Phillips.

February 4, 1966

LODER APPEAL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y. WOrth-2-0689

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TO THE CHIEF JUSTICE and ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now Comes Randolph Phillips by his attorney, and shows by his affidavit appended hereafter that he is the

owner of 100 shares of Alleghany Corporation common stock and has continuously held said shares since November, 1954; and as such respectfully applies to this Honorable Court for leave to file as *amicus curiae* in support of petitioners' appeal the brief on the jurisdictional issue herein dated February 4, 1966.

Preliminary Statement

As shown by the decision of the district court, applicant as a representative of the stockholders' group in opposition to the Alleghany Corporation management negotiated the Kirby settlement at issue herein (R. 2308-2309; 218 F. Supp. at 177).* The suppressed documents described by petitioners' brief herein were withheld from applicant's group (R. 2359-2360). Accordingly, applicant makes this application both as a victim of the alleged fraud at issue herein, and to preserve the rights of the shareholders on the jurisdictional issue.

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* Applicant's group, without knowledge of the suppressed documents, was responsible for defeating the $700,000 cash settlement negotiated by attorney Abraham L. Pomerantz with Young, Kirby and the Murchisons and obtaining a settlement of $3,000,000 cash plus return of the controlling stock of the $3 billion IDS system of investment companies (R. 2308-2309; 2339).

The Grounds for this Application

1. On June 1, 1965 this Court granted the petition for writ of certiorari with respect to all questions presented. The petitioners, however, have failed to present in their brief on the merits, filed herein on January 21, 1966, and contrary to their representation in the petition (October Term 1964, No. 1158, at p. 4) the jurisdictional issue that was set forth as question 5 of the "Questions Presented".*

This question was the sole one directed at challenging the jurisdiction of the State Court to decide the subject matter of this appeal, a claim based on the alleged violation of the Securities Exchange Act of 1934.

Petitioners in their petition for the writ stated "**(5) The Jurisdictional Issue.** If this writ is granted petitioners will also raise a jurisdictional issue which arises as a result of this court's decision in *J. I. Case* v. *Borak*, 377 U. S. 426 (1964)" (p. 26). Petitioners there contended, as did Alleghany Corporation itself in the court below and as does applicant herein, that in view of the provision of Section 27 of the Securities Exchange Act vesting "exclusive jurisdiction" in "the district courts of the United

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*"QUESTIONS PRESENTED

* * * * *

If this petition is granted, the following question will also be raised:

5. Did the state court have jurisdiction to authorize the settlement of the exclusive federal claim being asserted here? If not, can the court's approval of the settlement bar prosecution of that claim which is still pending in the federal district court? *

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* This question, unlike the other questions was answered affirmatively 8-0 by the *en banc* Court of Appeals in a footnote to its *per curiam* opinion on rehearing (340 F. 2d at 312, n. 1). We believe the Court was in error." (Petition in No. 1158, October Term, 1964, at p. 4.)

States of violations of this chapter or the rules and regulations thereunder", the State Court was without jurisdiction to enter its judgment disposing of the claim at issue herein.

Petitioners further contended in their petition to this Court as did Alleghany below and as does applicant herein, that defendant Allan P. Kirby had no standing to claim this issue is *res judicata* as to himself. Applicant shows in his brief that the Court below was misled by Kirby into finding this jurisdictional issue had been "decided by the New York courts" (340 F. 2d 311, note; R. 2375, note), a finding which is the sole basis for its conclusion that Kirby was entitled to the defense of *res judicata* on this issue. If the State Court made such a determination it was *sub silentio,* inasmuch as the decisions cited by the Court below and upon which it relied for its conclusion show no reference to or mention of the point. (See Amicus Brief at pp. 2-3).* The Appellate Division record upon which the court below based its conclusion shows that the Appellate Division never reached the issue of "exclusive jurisdiction" in the federal court. Kirby misled the court below by quoting only from appellant Rosen's brief and by failing to quote or otherwise provide for the record a copy of defendants' brief showing that they successfully urged that consideration of the jurisdictional issue was "premature." (See Amicus brief at pp. 4-7.) We have ascertained that when petitioners herein abandoned the jurisdictional issue, they were unaware of defendants' Appellate Division brief with its argument of "prematurity".

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* We doubt that a court as responsible as the Appellate Division may reasonably be found to have "decided" so important a point as the "exclusive jurisdiction" of the federal courts *sub silentio.* The lower court wrote no opinion.

2. The present representation of the minority shareholders is now inadequate to protect their interests in the jurisdictional issue. This application is timely and will not, if granted, delay submission of the cause herein nor require postponement of the oral argument now scheduled for the week of February 28th.

This application is timely filed since it was not until January 21, 1966—only 2 weeks ago—that petitioners filed herein their brief on the merits and that applicant thereafter learned of their abandonment of question 5. To obtain counsel and prepare this application and brief in such short time is a measure of the expedition with which applicant has acted.

Wherefore, applicant Randolph Phillips respectfully applies to this Honorable Court for leave to file his *amicus curiae* brief herein dated February 4, 1966.

Respectfully submitted by

SIMON V. HABERMAN,
2112 Broadway
New York, N. Y. 10023
Attorney for Movant
Randolph Phillips

February 4, 1966.

VERIFICATION

State of New York,
County of New York—ss.:

RANDOLPH PHILLIPS, being duly sworn, deposes and says that he is applicant herein; that he has read the foregoing application and knows the contents thereof; that the same is true to his own knowledge, information and belief.

s/ RANDOLPH PHILLIPS

Sworn to before me, this 2nd
day of February 1966

SIMON HABERMAN
Notary Public, State of New York
Certificate filed Albany County Clerk
Commission Expires March 30, 1967